No. 5982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, *Appellant*,

vs.

ROSE M. ALLEN, *Appellee.*

Brief of Appellee

On Appeal From the District Court of the United State for the District of Idaho, Southern Division.

CHARLES C. CAVANAH, District Judge

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STATEMENT OF THE CASE

This is an action brought in the District Court of Twin Falls County, State of Idaho, by Rose M. Allen, plaintiff below, appellee herein, to recover on an insurance policy which was issued by the General Insurance Company of America, defendant below, appellant herein, on September 20, 1924, to C. L. and R. A. Reynolds, which policy insured a building upon property situated in the town of Filer, Idaho (Tr. 14). To this policy was attached a

Standard or Union mortgage clause form (Tr. 29) by the provisions of which the loss or damage under policy was made payable to Rose M. Allen, as mortgagee (Tr. 29). The building insured was totally destroyed by fire on August 29, 1928 (Tr. 60). The amount of the policy was for $10,000.00. Proof of loss was made by the mortgagee (Tr. 199).

Prior to 1919 the Filer Hardware Company was conducting a hardware business in the City of Filer in the building in question. Mr. Allen, the husband of the appellee herein, was the owner of considerable stock in the company. He died in the year 1919 and in the settlement of the estate his stock in the Filer Hardware Company was sold to Reynolds brothers, in payment of which Richard A. Reynolds and Charles L. Reynolds and their respective wives, made executed and delivered to the appellee herein their certain promissory notes (Plaintiff's Exhibits 6, 7, 8 and 9, Tr. 172-176). The total of the notes given was something like $12,629.73. As security for said notes a mortgage was executed by the Reynolds brothers and their wives for the total sum of the indebtedness which notes and mortgage were dated June 20, 1919 (Tr. 177). At the time these notes and mortgage were executed by Reynolds brothers in the office of Mr. Hazel, attorney for the appellee herein, it was agreed that insurance should be taken out on the building as additional security for not less than $10,000.00 with

a mortgage clause attached, payable to Mrs. Allen (Tr. 62). In accordance with that agreement a policy was taken out as agreed upon with a mortgage clause attached through one Mr. Anderson, an insurance agent at Filer (Tr. 62). Mrs. Allen, appellee herein, was then residing at Filer and the policy was put in Mrs. Allen's box at the First National Bank of Filer, the policy being left there either by the agent, Mr. Anderson, or by Mrs. Allen herself. This policy was a one year policy and was renewed from year to year until 1924 (Tr. 62). Shortly after this Mrs. Allen moved to Twin Falls, Idaho, and resided in Twin Falls up until April, 1924, when she moved to San Diego, California, where she has resided ever since.

Sometime in April, 1924, Mr. R. A. Reynolds spoke to Mrs. Allen about securing a five-year policy upon the premises so as to avoid the trouble and annoyance of renewing each year, which arrangement was agreeable to Mrs. Allen (Tr. 63-119). In September, 1924, Mr. Reynolds took up the matter with Mr. Anderson, agent of the defendant company, in regard to a five-year policy, which the policy in question was represented to be by Mr. Anderson (Tr. 63-119) and would be a cheaper policy than the one he had been carrying (Tr. 63). Mr. Reynolds thereupon instructed Mr. Anderson to make out the policy, and to put it in Mrs. Allen's box at the bank (Tr. 63). Mr. Reynolds did not

see the policy after it was made out in Mr. Anderson's office and did not know what Mr. Anderson did with the policy (Tr. 63). Mrs. Allen instructed Mr. Reynolds in April, 1924, to leave the new policy that was to be issued with the First National Bank at Filer, to be placed in her safety deposit box (Tr. 66). Mrs. Allen never saw the policy after it was issued.

Mr. Anderson was agent of defendant company at Filer, Idaho, at the time the policy in question was issued and continued as such up to May, 1925, when he sold out his insurance business to Raymond F. Graves and later F. C. Graves and Son took over the business (Tr. 88-105), and they continued as such agents up to time of trial. All the records, supplies and policies issued (ten or fifteen in number) and kept by Mr. Anderson for safe keeping were turned over to Raymond Graves (Tr. 89-95).

On September 20, 1924, the date of the policy in question, the first year's premium was paid to Mr. Anderson. The second year's premium was due September 20, 1925, but was not paid by R. A. Reynolds to F. C. Graves & Son until March 2, 1926, (Plaintiff's Exhibits 4 and 5, Tr. 170-171). No other premiums were paid by Mr. Reynolds.

No demand, either by F. C. Graves and Son or the defendant company, for the payment of any premium on this policy was ever made upon Mrs.

Allen and she was never notified that the premiums had not been paid (Tr. 67-92-108).

The building was totally destroyed by fire on August 29, 1928, and was worth an amount far in excess of the face of the policy (Tr. 60-79). There was due Mrs. Allen on her notes and mortgage at the time of trial $10,675.82 (Tr. 65) which was in excess of the face of the policy.

After issuing of the policy the question of insurance never came up for discussion until after the fire (Tr. 73-74). After the fire her brother wired her that the building had been destroyed by fire and she then wired back to her brother that the policy was in her box at the bank (Tr. 74). He answered that the policy could not be found in the bank. She then came on to Filer to look after the matter herself (Tr. 74).

A brief resume of the proceedings that actually took place in the trial court in this case will give us a better understanding of the issues that should be considered in this Court.

This action was commenced in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County. A demurrer was filed in that court by the defendant (Tr. 32) and afterwards a petition for Removal to the Federal Court at Boise was filed and case removed. Afterwards the demurrer was argued in the Feder-

al Court and the same was overruled (Tr. 33), but no exceptions to the overruling of said demurrer were saved or preserved by the defendant. Afterwards a stipulation waiving jury was filed and the defendant filed its answer under date of March 1, 1929, (Tr. 34). The case was tried to the court on April 29 and 30, 1929, (Tr. 52). The same was argued orally and written briefs were filed by both parties and the matter taken under advisement by the court. On July 1st the court rendered its memorandum opinion (Tr. 132-135). Afterwards on July 2nd a judgment was entered for plaintiff in accordance with the memorandum opinion.

No request for special findings or declaration of law was made by the defendant prior to the entry of the judgment.

Afterwards on July 11, 1929, the defendant filed a motion asking that special findings be made by the court (Tr. 137-138). Objections were filed to said request by the plaintiff below (Tr. 140) and on July 22, 1929, the court denied the request for special findings (Tr. 141-2) to which ruling no exceptions were saved or preserved by the defendant.

On July 30th, the defendant filed a request for declaration of law in favor of defendant (Tr. 142). Objections were filed to this request (Tr. 143) and on July 30, 1929, the court denied the application of the defendant for declaration of law (Tr. 145-146)

to which ruling the defendant saved an exception (Tr. 144-145). On July 30, 1929, the court entered a Nunc Pro Tunc order correcting judgment by allowing the defendant credit for two year's unpaid premium on the judgment which had theretofore been entered (Tr. 146-147). On August 1, 1929, a motion for new trial was filed (Tr. 148-152). On September 6, 1929, the proposed bill of exceptions together with suggested amendments by the appellee herein were considered by the court as was also the motion for new trial and the bill of exceptions was allowed and the motion for new trial denied (Tr. 215). It seems that the order denying the motion for a new trial and the order allowing the bill of exceptions are not embodied in the transcript.

On September 24, 1929, the petition for appeal was filed, appealing from the judgment, the order denying the defendant's request for declaration of law and the order of the court denying the defendant's petition for new trial (Tr. 215-216).

ARGUMENT

We have set forth in detail all the different steps taken in the trial court in this case so that this Court can see at a glance the subjects that are rightfully presented for review in this Court.

No request for special findings and no request for declaration of law having been made to the

trial court before the entry of judgment, and the case having been tried to the court without a jury, the only matters that can be considered by this Court on appeal are:

FIRST: SUFFICIENCY OF THE PLEADINGS TO SUPPORT THE JUDGMENT.

Appellant in its brief, Assignment of Error XVIII (Appellant's Brief p. 14) claims that the trial court erred in overruling defendant's demurrer to complaint. Inasmuch as no exception was preserved by the defendant to the order of the court overruling the demurrer (Tr. 22) that matter cannot be presented for review in this Court. Under this Assignment of Error let us consider the complaint to see whether or not it states a cause of action against the defendant below (Tr. 9-13, incl.)

It is alleged that the defendant is a corporation, with headquarters at Seattle, Washington, and is engaged in fire insurance business in Idaho; that on the 20th day of September, 1924, R. A. Reynolds and C. L. Reynolds were and are now the owners of certain property in Filer, Idaho; that on said date the said Reynolds brothers applied to Arthur E. Anderson, agent of the defendant company at Filer, Idaho, for a $10,000.00 policy of fire insurance on their property in Filer; that they paid the premium demanded and that a *Five Year Policy* was issued to them, a copy of the policy and all

riders were attached to the complaint; that on the 29th day of August, 1929, the building upon which insurance was held, was totally destroyed by fire; that the loss sustained by plaintiff was $10,000.00, and the value of the building was in excess of said sum; that previous to the issuance of said policy the said R. A. Reynolds and C. L. Reynolds had executed notes and mortgage on property in question to plaintiff in the sum of $12,647.00, and that the defendant company, at the request of Reynolds brothers, at the time of the issuance of the said policy, attached a mortgage clause to said policy, payable to plaintiff; and that said mortgage debt had not been paid, and that there was then due thereon $10,313.80; and that since the building so insured was destroyed, the real property left had no value. In paragraph VIII of the complaint it is alleged that the policy provides that the defendant might cancel said policy as to Reynolds brothers but that it shall remain in full force for benefit of mortgage for ten days after notice to mortgagee; that no notice of cancellation, or any other notice had ever been given to plaintiff; that plaintiff had no knowledge of any cancellation, if any was made ,and that no cancellation had ever been made; and that she at all times stood ready to pay any premium of any kind upon said policy, but that no demand had ever been made upon her for the payment of any premium.

That plaintiff on September 20, 1928, desired to make proof of loss and asked that proof of loss forms be sent to enable her to make proof of loss, and that an adjuster be sent to adjust loss; that defendant failed to furnish forms for proof of loss but that plaintiff on October 11th, 1928, furnished defendant proof of loss (Tr. 9-13, inc.).

The allegations in paragraph VIII of the complaint anticipate the defenses by the Insurance Company of cancellation, and in our judgment, were not necessary to entitle plaintiff to recover. That was a matter of defense and had to be pleaded by defendant. The defendant had refused to pay the loss and had advised plaintiff of the reason why (Plaintiff's Exhibit 18, Tr. 190), and for that reason those allegations were inserted in the complaint as an extra precautionary step.

There was a direct allegation in the complaint that the contract of insurance set up in the complaint was a five year contract and that the first and second year's premium had been paid by the mortgagors which showed that the contract had been in full force and effect and that insofar as the mortgagee was concerned had never been cancelled in the manner and method provided in the mortgage clause.

Counsel for Appellant in their brief discuss the terms and conditions of the contract between the

mortgagors and the Insurance Company. That is not the issue in this case. The Standard or Union Mortgage Clause attached to the policy consitutes the contract between the Insurance Company and the mortgagee. That Standard Mortgage Clause constitutes a separate and independent contract between the Insurance Company and the mortgagee, unaffected by any conditions which invalidated the policy as to the mortgagors.

It should be unnecessary to cite any authorities as the rule of law has been so long and firmly established by all courts that they do not even discuss it any more. We will, however, refer to a few early cases that show conclusively the logic and reason for the rule.

In the case of Syndicate Ins. Co. of Minneapolis vs. Bohn, 65 Fed. 165 (C. C. A. 8th), which is the earliest Federal case we have found, we find a very able and lengthy discussion of the question. In that case the court said:

> "But one of the 'following stipulations', to which the first sentence of this mortgage clause is 'subject', is that this insurance, as to the interest of the mortgagee only, 'shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured'; and it is too clear and too well settled to admit of discussion that no act or neglect of the mortgagors, done or permitted after the policies and mort-

> gage clauses were delivered to the mortgagee, although fatal to the mortgagor's recovery, could deprive the uninformed mortgagee of its indemnity. City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co. 122 Mass. 165; Phoenix Ins. Co. vs. Floyd, 19 Hun. 287; Hartford F. Ins. Co. v. Olcott, 97 Ill. 439, 455."

And later in the opinion the court used this language:

> "It is true that Bohn paid the premiums for this insurance, but a promise to pay or indemnify is no less binding when the consideration is paid by a third party than when it comes directly from the payee or the insured. Hartford F. Ins. Co. v. Olcott, 97 Ill. 439, 454, and cases there cited. The agreement evidenced by this mortgage clause was therefore a valid contract between the mortgagee and the insurance companies, made upon sufficient consideration, for the evident purpose of protecting the indemnity guaranteed to the mortgagee by these companies against the destruction by any act or neglect of the mortgagors."

and later on the court said:

> "If the insurance companies had notified this mortgagee at any time before the loss that the original policies were or might have been invalid at the inception of the contracts between them, the latter would undoubtedly have surrendered the contracts and sought insurance elsewhere. They waited until the loss had oc-

curred, and it is now too late for them to retract their representations. They are estopped to deny the truth of their statement, to the manifest injury of the mortgagee."

The Supreme Court of Mississippi in the case of Bacot vs. Phoenix Ins. Co. 50 So. 729, said:

"If, then, the contract between the mortgagee and the insurance company is a wholly independent contract from that of the original owner or mortgagor, how can it be that any but the conditions contained in the mortgagee's contract affect his rights? His rights are independent, not derivative from the mortgagor's contract. Under this independent contract, he is not a mere appointee of the mortgagor to receive the proceeds of the policy, in case of loss, by virtue of and under the contract of the mortgagor, but the mortgagee gets an independent right, an independent contract with the insurance company, whereby the insurance company insure his individual interest in the property."

And later on the court used this language:

"We unhesitatingly hold that the contract of Bacot with the insurance company as mortgagee was an independent contract, dependent for its validity alone upon the conditions placed by the statute in the mortgage clause, and unafected by any conditions which invalidated the policy as to the mortgagor, whether prior or subsequent to the insertion of the mortgage

clause. Our views of the mortgage clause can be stated in no better language than it is put in the case of Hastings v. Westchester F. Ins. Co. 73 N. Y. 141: 'The intent of this clause was that in case, by reason of any act of the mortgagors or owners, the company should have a defense against any claim on their part for a loss, the policy should nevertheless protect the interest of the mortgagees, and operate as an independent insurance of that interest, and indemnify them against loss resulting from fire, without regard to the rights of the mortgagors under the policy; and, to effectuate that intention, we should hold that, as against the mortgagees, the defendant cannot set up any defense based upon any act or neglect of the mortgagors, whether committed before or after the issuing of the policy, or the making of the agreement between the company and the mortgagees . . . The intent of the clause was to make the policy operate as an insurance of the mortgagors and the mortgagees separately and to give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts . . . This provision, in case the policy were invalidated as to the mortgagors, made it, in substance, an insurance solely of the interest of the mortgagees by direct contract with them, unaffected by any questions which might exist between the company and the mortgagors.' "

This Court had the question before it in the case

of Brecht vs. Law, Union & Crown Ins. Co. 160 Fed. 399, and at page 403 used this language:

> "When the policies sued on were issued, it was not unusual for insurance companies to insure the interest of mortgagees by attaching to their policies slips containing what is known as the 'Union Mortgage Clause', whereby the insurance company agreed to pay to the mortgagee the amount to become due under the policy as his interest might appear, regardless of subsequent breaches of certain conditions of the policy by the mortgagor. The following cases arose under policies containing such a clause: Magoun v. Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324; Hastings vs. West chester Ins. Co. 73 N. Y. 144; Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614. Now, if it had been the intention of the defendant to insure the plaintiff in error absolutely and without reference to any breach of the conditions of the policies by the St. Johns Lumber Company, such insurance could have been effected by the use of the 'Union Mortgage Clause' in defining the rights of the plaintiff in error under the policies; but, instead of doing this, the parties adopted a form merely designating him as the person to whom the loss, if any, should be payable, a form which under well-settled rules subjects the appointee to the risk of all acts and omissions of the person to whom the policy was issued."

SECOND: ERRORS OF LAW OCCURRING AT THE TRIAL AND DULY EXCEPTED TO BY THE DEFENDANT BELOW.

Let us now consider the second proposition that can be considered by this Court upon review which is Errors of Law occurring at the trial and duly excepted to by the defendant below. Rule 63 of Rules of Practice of the U. S. District Court for the District of Idaho provides:

> "In actions at law in which a jury has been waived as provided by the act of Congress, it shall be in the discretion of the court to make special findings of fact upon the issue raised by the pleadings. Ordinarily, the court will make such findings on request of either party, if such request be made on or before the submission of the cause for decision."

See also Sections 649 .and 700, U. S. Compiled Statutes.

This Court has in a number of cases discussed the rule and we will refer to only a few cases. In the case of Dunsmuir vs. Scott, (C. C. A. 9th) 217 Fed. 200, at page 202 the court said:

> "The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on ex-

ception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the Court, it is reviewable upon a motion which presents that issue of law to the Court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the Court to which exceptions were reserved during the progress of the trial."

In the same case the court used this language:

"Under the provisions of Sec. 649 and 700 U. S. Compiled Statutes the rule is well settled that if a jury trial is waived and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review. (See long list of cases cited). In Dirst v. Morris, 14 Wall, 20 Law Ed. 722, Mr. Justice Bradley said 'But as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.' "

In the case of Callan vs. U. S. Spruce Production Corporation (C. C. A. 9th) 28 Fed. (2d) 770, the court held:

"On appeal, in a case tried to the court from

> a decree of dismissal entered on a general finding, where no exceptions were taken and no request for findings was made, no question for review is presented; Judicial Code, Sec. 269 (28 USCA, Sec. 391) not authorizing a review of the evidence."

Again in the case of Sierra Land & Livestock Co. vs. Desert Power & Mill. Co., (C. C. A. 9th) 229 Fed. 982, the court held that the appellate court cannot on appeal inquire into the sufficiency of the testimony to support a general finding, where at the close of the testimony there was no application for a declaration of law that upon the whole case the finding should be for the plaintiff or defendant.

This Court again in a more recent case, Feather River Lumber Co. vs. United States, 30 Fed. (2d) 642, at page 643 of the opinion said:

> "A jury trial having been waived by the written agreement of the parties, the case was tried to the court. At the conclusion of the testimony both parties asked for special findings, but none were made. The court, having found for the plaintiff, caused a judgment to be entered against the defendant for damages in the sum of $41,575.80 and the costs of the action. The defendant assigns as error the denial of its motion for dismissal and non-suit at the close of the government's case, made on the ground that the evidence adduced was insufficient to sustain a finding in favor of the

plaintiff. The denial of that motion cannot avail the defendant as ground for reversing the judgment. After it was denied the defendant proceeded to introduce its testimony, and at the close of the trial it made no motion for judgment on the ground of the insufficiency of the evidence to sustain the complaint. The rule that under the circumstances here presented the evidence cannot be reviewed by an appellate court has been so frequently applied by this and other courts as to render unnecessary a review of the authorities. Deupree v. United States (C. C. A.) 2 Fed. (2d) 44, 45; Clark v. United States (C. C. A.) 245 Fed. 112; Fleischmann Co. vs. United States 270 U. S. 249, 46 S. Ct. 287, 70 L. Ed. 624. A general finding having been made by the court below, the review in this court is limited to the rulings of the trial court in the progress of the trial. Dunsmuir v. Scott (C. C. A.) 217 Fed. 200; New York Life Ins. Co. v. Dunlevy (C. C. A.) 214 Fed. 1; Pabst Brewing Co. v. Horst Co. (C. C. A.) 264 Fed. 909."

Even if the request for special findings made by the defendant in this case (Tr. 138) might be considered by this Court on review the same was not sufficient in law as it failed to specify the special findings desired. As stated in the case of Feather River Lumber Co. vs. United States, supra, at page 643 of the opinion:

"The records show that both parties made

> oral request for special findings, but such a request without specifying the findings desired does not serve to bring to the court's attention any question of law."

This Court must bear in mind, however, that no exception was saved to the ruling of the trial court on this request for special findings (Tr. 141). In the case of Fleischmann Co. vs. United States, decided March 1, 1926, 270 U. S. 350, 70 L. Ed. 624, in discussing the question as to the subjects that are for review in an appellate court where no special findings of fact or declaration of law is requested before the entry of the judgment in the trial court, at page 629 of L. Ed. the court said:

> "It is settled by repeated decisions that, in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except insofar as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by statute." A long list of authorities is cited.

Again in the same opinion the court used this language:

> "To obtain a review by the appellate court of the conclusion of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the pro-

positions of law to the court and obtain a ruling on them."

From the above it is conclusively shown that the only matters that can be considered by this Court are questions involving the admission or rejection of evidence over the objections of the defendant, and to which an exception was saved.

In the 4th Assignment of Error in Appellant's brief, page 7, the matter of permitting the witness R. A. Reynolds to answer a question was assigned as error, but we do not find the matter discussed in the brief and therefore take it that the same has ben waived. Even if the matter could be considered there is no statement or allegation that the answer was prejudicial.

In the 5th Assignment of Error of Appellant's brief, page 8, it is alleged that the court erred in sustaining objection to a certain question asked Rosa M. Allen in cross-examination. This error has not been discussed in the brief other than the simple fact of the assignment thereof. In fact it shows conclusively that the court did afterwards permit the witness to answer the question, so that no prejudice or error could arise thereon.

The 6th Assignment of Error as shown in Appellant's brief, pages 9 and 10, shows an attempted inquiry into some matter which was not raised by the pleadings and was entirely immaterial upon

rebuttal. Furthermore, the matter was not discussed by counsel in their brief.

Assignment of Error No. 8 appearing in Appellant's brief, page 40, raises the question as to the right and the effect of a request for declaration of law after the entry of the judgment. A request for declaration of law was filed by the defendant on July 30, 1929, and denied by the court on the same day (Tr. 142-145-146).

The question now arises as to what is the effect of this request at this late date. The case of Utah Mines & Smelting Co. vs. Beaver Co. 262 U. S. 325, 67 L. Ed. 1004, is cited for the purpose of showing that the trial court has the right to consider such a request. Counsel for appellant reason therefrom that by reason of the fact that the court had the power to consider a request after the entry of the judgment that its action in denying the request opens up the whole question of the propositions of law involved in the case the same as though it would had the request been made before the entry of the judgment. We believe that the rule announced in that case will bear no such construction. The most that can be said for the rule is that the trial court has the discretionary power to consider a request of this character after the entry of the judgment and that the action of the trial court is discretionary and is not subject to review except for an abuse of dis-

cretion. If our interpretation should be placed on the rule above mentioned and applied to the facts in the case at bar, you will readily see that no argument is made to show any abuse of discretion on the part of the trial court.

The case of Muentzer vs. Los Angeles Trust & Savings Bank, (C. C. A. 7th) 3 Fed. (2d) 222, is cited by appellant in support of its position that this Court should, in the case at bar, consider the assignment of error challenging the sufficiency of the evidence to support the judgment, claiming that section 269 of the Judicial Code liberalized the power of the appellate court to that extent. We have been unable to find that the case above referred to from the Seventh Circuit has been cited or discussed by a single court since its announcement.

Counsel for Appellant must have overlooked something. That question was before this Court in the case of Callan vs. U. S. Spruce Production Corporation, 28 Fed. (2d) 770, and the court in passing upon it used this language:

> "To say that Section 269 of the Judicial Cde (28 USCA Sec. 391) authorizes a review of the evidence upon such a record would be to hold that it repeals the sections of Revised Statutes above cited. We do not think it is intended to have that effect."

We must, therefore, consider that question as settled in this Court.

Appellant's Assignment of Error No. IX claims that R. A. Reynolds, acting for himself and as agent for the plaintiff below, on October 4, 1926, consented to the cancellation and thereby cancelled the policy in question.

The evidence shows that the plaintiff instructed Mr. Reynolds to have this policy when executed left at the Bank in Filer so it could be placed in her safety deposit box (Tr. 66-73); that Mr. Reynolds then instructed Mr. Anderson, the agent of the defendant company, to deliver the policy to the bank where it could be put in Mrs. Allen's bank box (Tr. 63). This evidence is not denied.

The Appellant contends that this policy was in Mr. Reynolds' possession on October 4, 1926, and on that date he delivered it up for cancellation to Mr. Graves, and that the policy was then cancelled by Mr. Graves and mailed to the company. This was denied by Reynolds, who contended he never saw the policy after it was issued (Tr. 59). The contention of plaintiff is that she never authorized Mr. Reynolds or any other person to cancel this policy (Tr. 87), and that the contract of insurance insofar as she was concerned never was cancelled.

An extended argument appears in Appellant's brief under this title on the theory that Mrs. Allen

was careless and negligent in not examining her papers to see that the policy was in full force and effect and that she should be estopped now from recovering on the policy. The provision of the mortgage clause in regard to cancellation (Tr. 30), condition III thereof, is as follows:

> "This company reserves the right to cancel at any time as provided by its terms but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after the notice to mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right on like notice to cancel this agreement."

If the insurance company in this case had used half the care in protecting its rights in regard to cancellation by notifying Mrs. Allen in accordance with the provisions of her contract, that they now claim Mrs. Allen should have used, there would have been no occasion for this law suit, as Mrs. Allen could have then protected her rights by securing other insurance or paying the premium.

On the question as to the right of the mortgagor, as the agent of the mortgagee, to cancel the policy of insurance, we wish to cite one case only. City of New York Insurance Co. vs. Jordan, (C. C. A. 5th) 284 Fed. 420. At page 422 the court said:

> "To say the least, authority of an agent to terminate existing insurance is not plainly con-

> ferred by a request of the owner of property that property already insured be kept insured —to keep the owner protected 'at any time any company cancelled a policy.' The evidence indicates the absence of any intention to empower the agents by their voluntary act to create a situation calling for new insurance. The extent of the authority of the agents is determined by the terms of the request made by the principals. The fact that there had been a single instance of the principals accepting a policy issued by the agents in place of one which was cancelled without notice to the principals cannot properly have the effect of giving the request or direction a meaning different from that expressed by its language."

We will not continue the discussion of this subject further as the general finding of the trial court is amply supported by evidence.

Estoppel

There is another incident that occurred which estops the defendant from claiming that the policy was not in full force and effect. It appears that on July 30, 1929, the trial judge of his own motion signed a Nunc Pro Tunc order correcting the judgment allowing the defendant credit for two years premium on the policy, namely, the premium due September 20, 1926, and September 20, 1927 (Tr. 146-147). A copy of this order correcting the judgment was served upon counsel for the defendant

and no objections were made to the same, the result being that they have accepted credit for the two years' premium without any protest to the trial court and now claim that the policy was cancelled for non-payment thereof. It seems inconsistent for the defendant to accept credit for the two years' premium which in law amounts to the payment of the premium by the plaintiff and then claim that the policy has been cancelled. The result of that action is the same as though the defendant had pleaded in its answer a counter-claim for the two years' premium. If it had done so then it would have been estopped from claiming that the policy was not in full force and effect. In the case of Johnson vs. Dakota Fire and Marine Insurance Co. (N. D.) 45 N. W. 799, the court held: (Syllabus)

> "At the time of the service of defendant's answer to the plaintiff's complaint in this action, the defendant had full knowledge of all the facts constituting the grounds of forfeiture of said policy by the plaintiff; and with such knowledge, and by way of counter claim in the answer, defendant seeks to recover from the plaintiff as a consideration for the issuance of the policy. Held, that pleading such counter claim operated as a waiver of the forfeiture of the policy. The policy was not void, but was voidable at the option of the Insurer. After knowledge of the forfeiture, defendant saw fit to demand judgment for its premium. This was equivalent to an independent action for the

premium, and waived the forfeiture. If the answer had not, among other defenses, pleaded a forfeiiture which went to the inception of the policy, and which would, if established, defeat the premium note ,the case would have been otherwise."

Policy Was a Five-Year Contract

In Appellant's brief, pages 14-25, inclusive, Assignment of Error XVIII contends that the contract in question was a one year policy instead of a five year policy. In the interpretation of this contract the same becomes a question of law and fact. The provision of the policy necessary to a consideration of this question is shown in the Transcript 130-131 in the discussion of this question by the trial judge. The provision of the policy referred to uses this language:

> "does insure C. L. and R. A. Reynolds for the term of five years from the 20th day of September, 1924, at noon, to the 20th day of September, 1929, at noon."

This provision, in our judgment, is so plain that it should not require any discussion as to what the intention of the parties was at the time the policy was issued. In addition to this, however, we find in the record (Tr. 63) that Mr. Anderson, the agent of the company at the time the policy was issued, represented the same to be a five-year policy. Again we find in the agent's record (Plaintiff's Ex-

hibit 3, Tr. 165), the record made by the agent himself at the time was in these words:

> "Term 5 years, effective September 20, 1924."

In defendant's Exhibit No. 20 (Tr. 200), being that part of the policy retained by the company after cancellation, we find a notation made by defendant's agent as follows:

> "Expires September 20, 1929."

And again in defendant's Exhibit No. 21 (Tr. 202), being the office record of the defendant company and the notation made by the defendant itself at head-quarters, we find the following:

> "From 9/20/24 to 9/20/29."

Furthermore, in defendant's Exhibit No. 22 (Tr. 203), the same being a letter written by the agent Raymond Graves to Reynolds brothers on September 21, 1926, we find this language:

> "Enclosed find renewal certificate for 5 year policy, covering the garage and dance hall building here."

In the light of all these facts, we contend that it shows conclusively the interpretation placed upon the provisions of the contract by the defendant itself was a five year policy and not a one year policy. In order to shorten this brief we will dispense with any further argument and refer to the trial

court's memorandum opinion, appearing in the transcript at pages 130-131-132-133-134.

The appellant in this case filed a motion for a new trial (Tr. 148-49-50-51) containing nearly all of the Assignments of Error urged by the appellant on appeal and contained in its Assignment of Errors herein. The motion for new trial was denied as shown by the certificate of the trial judge to the bill of exceptions (Tr. 215). And the action of the court is not alleged as error herein which would preclude a consideration by this Court of the matters urged in the motion for new trial. The action of the trial court on the motion for new trial is not subject to review in this Court.

Subrogation

In Assignment of Error No. XIX (Appellant's brief, page 47) it is urged by appellant that the court erred in not providing that the defendant could be subrogated to all the rights of the mortgagee by giving it a full assignment and transfer of the mortgage and all the securities held by the plaintiff.

The question of subrogation is a matter which can be amply protected by the trial court when the time arrives. Subrogation exists only as a matter of equity and then only when the defendant has paid Mrs. Allen in full all of the amount that is due her.

A similar question was presented to the Supreme Court of Idaho in the case of Carroll vs. Hartford Insurance Company, 28 Idaho 466. In that case a motion was presented in the trial court asking for subrogation and the court denied the same. At page 482 in discussing the question that court said:

> "Appellant contends that the court erred in denying its motion for subrogation. In passing upon that motion the court said: 'It is by the court ordered that the motion of the defendant for subrogation to the rights of the plaintiff under said mortgage in proportion to the amount of the verdict of the jury be, and the same hereby is, deferred until such time as defendant shall pay to the plaintiffs the amount of said verdict and judgment rendered thereon, or pay said amount into court for the use and benefit of said plaintiffs.'
>
> "It thus appears that the trial court did not definitely determine the question of subrogation. Clearly, under the law the appellant is not entitled to subrogation, in any event, until it has paid or offered to pay the judgment in this case. Counsel for respondent contend that there is no subrogation clause in the policy and therefor it must be covered by the common-law rule, and cite 1 Clement on Fire Insurance, p. 478, where the author says: 'Where the insurance is not sufficient to cover the mortgage debt, the company takes nothing by subrogation and assignment until the mortgage is paid or tendered in full ,both principal and interest.'

> "However, the trial court did not deny the motion to subrogate, but simply held the matter in abeyance until such time as the company would make or tender payment of said judgment in full, at which time it reserves the right to take up and decide the said question."

The trial judge, since the trial of the case, is holding the original notes and mortgage of Mrs. Allen for the purpose of protecting the rights of the defendant below in case it ever signified its willingness to pay up. When the appellant pays the appellee herein the amount due her the court will see that its rights are protected.

CONCLUSION

We submit that the decision of the trial court should be affirmed. We also suggest that the penalty provided in Rule 30 of this Court should be applied in this case as it seems to us that this appeal has been made for the purpose of delay only.

Respectfully submitted,

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